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Supreme Court, U.S.
FILED

No 95-826 JUL 10 1995

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

SAM S. JENKINS SR.,

Petitioner

vs.

STATE OF NEW MEXICO SECURITIES DIVISION

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NEW MEXICO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

SAM S. JENKINS, SR.,
PRO SE APPELLANT
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ALBUQUERQUE, N.M. 87154
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September 12, 1995

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59 pp

QUESTION PRESENTED

Was it selective prosecution and a violation of Appellants Constitutional rights under Title 42 for the New Mexico Securities Division to prosecute Appellant under this cause.

Was Appellants Constitutional rights as a pro-se litigant violated as a non-lawyer by the "dominant lawyer prosecution" in this case.

Was it error for the New Mexico Securities Division to prosecute appellant as a non-registered broker-dealer, when the act complained of was clearly an "Exempt Transaction" under N.M. Statutes 58-13B-27; "An Isolated non-issuer transaction is exempt, whether or not effected through a broker-dealer."

Was it error for the New Mexico Court of Appeals to deny Sam S. Jenkins, Sr., full appeal by the court rather than dismiss this cause on calendar notice when case law and State statutes supported Appellant's argument for appeal.

Was it error for the Supreme Court of the State Of New Mexico to deny petition for writ of certiorari in this case.

PARTIES TO PROCEEDINGS BELOW

1. Sam S. Jenkins, Sr., Petitioner
2. State of New Mexico Securities Division, Respondent

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A. The decision of the Appellate Court violated the New Mexico Statutes and thereby deprived Petitioner of due process and equal protection of the laws.

B. The decision of the court of appeals was based on other errors

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A. Final order of Securities Div. of the State Of New Mexico, August 9, 1994

B. Petitioner's Response Brief to NMCA Calendar Notice, December, 20, 1994

C. New Mexico Court of Appeals Memorandum Opinion, March 16, 1995

D. Supreme Court Of State of New Mexico Order, April 10, 1995 Appellant

TABLE OF AUTHORITIES CITED

CASES

Arizona v. Allen 490 P.2d 10

"In crder for a transaction to be removed from the scope of an exemption in an "isolated transaction" where sales are not made in the course of repeated or successive transactions.....it must be shown that there were repeated and successive transactions and that sales were made for the benefit of the issuer".

Arizona v. Allen 107 Ariz. 538

"Supreme Court of Arizona ruled the sale of stocks, although securities was an "isolated transaction" and not subject to the registration requirement of the Securities act".

Davies v. Acware Plastics 254 P.2d 663

"Court of Appeals ruled where president and treasurer of a corporation was not engaged in

business of selling stock and sale of his personal stock to another was a "single" isolated transaction and he was not subject to the Securities act".

Gales v. Weldon 282 S.W. 2d 522

"See text State v. Weisser"

Kneeland v. Emerton 183 N.E. 155

"See text State v. Weisser"

(Table Of Authorities Cont'd.)

Marble v. Clein 347 P.2d 830

"Appellant claimed he was not in the business of regularly dealing in securities and that his sale of stock was a single isolated transaction unconnected with his regular occupation and he was not subject to the Securities act. Supreme Court of Washington agreed with Appellant".

Nelson v. State 355 P.2d 413

"Isolated non-issuer transaction is exempt from

the operation of the statutes.

New Mexico Statute 58-13B-27

"Exemption from the Securities act as "Isolated non-issuer transaction" under exempt transactions. No violations occur under exempt transactions".

State v. Weisser 161 N.W. 2d 360

"An isolated sale of a security means one standing alone, disconnected from any other, whereas repeated successive sales means transactions undertaken and performed one after the other and sales made within a period of such reasonable time to indicate that one general purpose actuates the vendor and that such sales promote the same general aim and are not part of a single plan" (Table Of Authorities Contd.)

U.S. Constitution Ammd. V, IX, X, XIV

"Due process and Equal Protection of the Laws"

"Targeting and selective prosecution by state or government in civil rights violation"

STATUTES

N.M. Statute 58-13B-27

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U.S. Const. Amend X

U.S. Const. Amend. XIV

PETITION FOR WRIT OF CERTIORARI

Sam S. Jenkins, Sr. of Albuquerque, New Mexico, respectfully petition a Writ of Certiorari be issued to review an opinion and judgement of the New Mexico Court of Appeals.

OPINION BELOW

Sam S. Jenkins, Sr., pro se Appellant applies to the Supreme Court Of The United States for review of;

The Final Order of the Securities Division Of The State Of New Mexico filed August 9, 1994, (Appendix "A" attached)

The New Mexico Court of Appeals' Memorandum Opinion in this cause filed March 16, 1995, (Appendix "C" attached) and The Supreme Court Of The State Of New Mexico Order entered in this cause on April 10, 1995, (Appendix "D" attached)

This petition is timely if filed in The Supreme Court Of The United States if filed on

or before July 10, 1995.

JURISDICTION

Exhausted appeals in State of jurisdiction ending with Final Order from the Supreme Court Of The State of New Mexico. Entry of Order from NMSC was April 10, 1995. This Petition is timely filed.

CONSTITUTIONAL PROVISIONS AND STATUES

New Mexico Statutes 58-13B-27 (Exempt Transactions) so states;

"The following transactions are exempted from Section 58-13B-20 NMSA 1978 and, unless otherwise noted, Section 58-13B-29 NMSA 1978: (A) An isolated non-issuer transaction, whether or not effected through a broker dealer."

The Constitution of The United States;"Due Process and Equal Protection of the Laws" Amendments V, IX, X, XIV

STATEMENT OF CONSTITUTIONAL QUESTIONS RAISED

IN THE COURT OF APPEALS, STATE OF NEW MEXICO, Appellant Petition For Review, filed

September 4, 1994, Page 1, Appellant raised issue of "Political persecution under the guise of judicial prosecution in violation of constitutional rights". Page 2, Appellant raised issue of "constitutional conflict with the trier of facts in the Securities Division". December 20, 1994, Appellant Response Brief to Calendar Notice in the New Mexico Court of Appeals, Page 4, Appellant states "The Securities Commission pursuit of the alleged complaint was an act of political persecution under the guise of judicial prosecution violating Appellants constitutional rights under due process". Page 5, Appellant states, "A constitutional conflict exists in a number of areas, the trier of fact for the Securities Commission is a lawyer in a related case with the Appellant". "Appellant requests Court to apply financial sanctions against Securities Commission for unconsciable and willful acts of harassment in pursuing Appellant in an action which they knew the Appellant was exempt under

the statutes". Supreme Court Of The State Of New Mexico, Appellants Petition For Writ Of Certiorari, filed March 22, 1995, Page 1, Appellant raises issue of constitutional violation of New Mexico Court of Appeals to dismiss on calendar notice when State Statute supported appellants petition. Page 3, Appellant raises issue of "Selective Prosecution" by Government agency of Appellant.

STATEMENT OF THE CASE

1. Course Proceedings Below

This a case is in which the New Mexico Securities Division alleged violations of the New Mexico Securities Statutes. The claims of the Securities Division are governed by New Mexico law. The Plaintiff is the New Mexico Securities Division. The defendant is Sam S. Jenkins, Sr.. There are no other parties to the litigation. (See Appendix "A")

NMSD filed their order on July 15, 1993, alleging the defendant had violated the State Securities statutes of the State of New Mexico.

The defendant answered on July 26, 1993 denying the allegations, claiming that no statutes had been violated.

A hearing was held on October 14, 1993 with John B. Hiatt acting as hearing officer. Defendant raised the issue that Hiatt was the supervisor of another lawyer in another

government agency where the defendant had alleged a lawyer conspiracy attempting selective prosecution.

Defendant argued there were no violations of the Securities statutes as the act complained of was an "isolated transaction" by the very definition of the N.M. Securities statutes NM 58-13B-27 and was an "exempt" transaction. Defendant argued he was targeted for selective political persecution under the guise of judicial prosecution.

The Securities Division found the defendant's acts did not meet the requirements of an "exempt" transaction and ordered defendant to pay a total civil penalty in the amount of $2000.00.

Petitioner then appealed the order to the New Mexico Court of Appeals. The Court of appeals suggested a "calendar disposition". Petitioner filed a response brief to the calendar notice and supporting memorandum

(See Appendix "B").

The New Mexico Court of Appeals issued a Memorandum Opinion on March 16, 1995, affirming the judgement of the NMSD (See Appendix "C"). This opinion is highlighted with several errors. The Court in adopting the recommendations of the hearing officer referred to the "shares in All States Publishing, Inc., offered by Respondent. No shares of stock were offered "in" All States Publishing, Inc., but rather shares in a book held "by" All States Publishing, Inc.. The Court further states "the Securities Division started their investigation before learning of the content of the book". Evidence shows this to be untrue.

The Court of Appeals almost totally disregarded the main issue, that of an "isolated transaction" and therefore exempt under the New Mexico statutes.

A petition was filed by petitioner for review to the New Mexico Supreme Court and no consideration for review was given that petition

with order denying the petition issued on April 10, 1995 (See Appendix "F").

Petitioner now seeks review by this Court of whether the New Mexico Securities Division targeted petitioner for selective prosecution with due process and equal protection of the law being denied the petitioner. And whether the New Mexico Court of Appeals refusal to remand the case for further proceedings or to consider the argument of an "isolated transaction" and therefore "exempt" under the New Mexico statutes suggests a continuation of political persecution under the guise of judicial prosecution thereby depriving petitioner of his constitutional rights.

2. Factual Background

Appellant is an author and writer. This cause arises out of a book written and published under title of; "Dracula In Charge Of The Bloodbank, An Expose Of The American Judicial System". The author, after six years of research had exhausted funds for publication and offered to sell "shares in the book" to assist cost in publication of the book. The author had previously sold some book shares to All States Publishing, Inc., a New Mexico closely held corporation controlled by the author's daughter. All States Publishing, Inc., agreed to further assist the author in publication costs and agreed to resell some of it's shares in the book. The author ran a classified advertisement with intent to sell an interest in the book and or resale of some of the shares owned by All States Publishing, Inc.. (No sale resulted as funds were obtained from other sources). An agent of The New Mexico Securities division

inquired by telephone about the offer. The agent's inquiry turned to the title of the book and about the book's contents-concluding it was not complimentary of the dominant lawyer culture in America.

The agent after a period of time then followed up and made an appointment to see materials on the book and talk about the book shares in an "undercover" visit with the author. The agent requested copies of the materials and then left the interview. Ninety days after the undercover agents visit (one a lawyer), the Securities Division filed a complaint against appellant based upon mis-statements of the undercover agents and conclusions of laws not supported by the N.M. Statutes or case law.

From the beginning of the case, the Appellant had reason to believe and stated on the record that this cause represents an act of "selective prosecution" not based upon sound conclusions of law. Since the book published by the appellant is not complimentary of lawyers

and the fact that lawyers dominated this cause beginning with an undercover lawyer setting up the "sting" to a government division headed by a lawyer to division staff lawyers prosecuting the cause to a lawyer acting as the hearing officer, the theory of "selective prosecution" and a lawyer conspiracy goes far beyond mere circumstantial evidence. The classified ad exacted below from the newspaper is the ad which triggered the investigation and was not unlike many ads of a similar nature placed under money wanted by others.

"Small investment 15% guaranteed return. Multi-published author. 292-7670 X8 or 821-7522".

Appellant has discovered that similar money wanted ads run by other advertisers during that period of time, in the same newspaper, were not called, interviewed or questioned by the New Mexico Securities Division about their ad. A fact which appears to be selective prosecution or "political persecution under the guise of

judicial prosecution", a clear violation of appellants' constitutional rights under XIV of the U.S. Constitution.

The prosecution, order or judgement by the New Mexico Securities Division is not supported by law or evidence presented in testimony at the hearing. The state statutes do not support the evidence in the case. The Securities act does not require licensing and registration of anyone making an offering which is exempt under the act. Appellant therefore could not have violated the Securities act.

The Securities Division Conclusions of Law are faulty and the opinion of the Appellate court simply compounds the fault. The conclusions in both instances disregard the volumes of case law and the New Mexico Statutes describing and defining the exact transaction of the appellant as an "Isolated non-issuer transaction", which goes to the heart of the entire case.

At page 3 beginning at line 2, the Appeals

Court Memorandum devotes the majority of it's opinion on "points of law" beyond it's review powers as being the substance of appeal. A review of the appeal by Appellant and Appellant's Brief To Calendar Notice clearly shows the substance of the appeal is in fact the issue of a statutory exemption in the transaction-which statute is the root issue in the case.

At page 4 beginning at line 3, the Appeals Court Memorandum errors in it's summation claiming shares offered by respondent were "shares in All States Publishing, Inc." No shares were offered in All States Publishing, Inc., but rather shares in the book sold to All States Publishing, Inc., which shares All States Publishing, Inc., agreed to resell if needed. The single fact to be considered is the N.M. statute and other case law which defines Appellant's transaction as an "exempt isolated non-issuer transaction". An exempt transaction would have precluded the Securities Division

complaint and all allegations therein. This fact has not been given significant weight and consideration making this a wrongful action from the beginning.

REASONS FOR GRANTING THE WRIT

A. SIGNIFICANT QUESTION UNDER THE NEW MEXICO STATUTES AND THE U.S. CONSTITUTION

New Mexico Statutes 58-13B-27 (Exempt Transactions) so states in part; The following transactions are exempted from Section 58-13B-20 NMSA 1978 and unless otherwise noted, Section 58-13B-29 NMSA 1978: Case law in the table of authorities support Appellant on this question.

> An isolated non-issuer transaction, whether or not effected through a broker-dealer.Under the U.S. Constitution Appellant is entitled to equal protection of the laws. The laws were not applied equally in this case, but rather applied selectively to this Appellant.

ARGUMENT

The statute at issue, N.M. 58-13B-27 (Exempt Transactions) and Federal Securities Act precludes the requirement for licensing and registration under the New Mexico Securities Act. The transaction was exempt under law and therefore the act did not violate in any way either through failure to license, to register or to offer. What occurred here was an act of

selective prosecution by a government bureaucracy headed up lawyers. The original complaint is prima facia evidence of the old lawyer ploy of throwing as much dung against the wall as possible, hoping something will stick. The Securities Division admitted much of it did not stick and acknowledged the same. Laws are not intended to be a selective tool for lawyer whims. The only remaining option under the complaint by these prosecutorial lawyers to get anything to stick was to simply disregard the statutes and the laws. This resulted in the entry of an order not intended, nor not at all consistent with the purposes fairly intended by the policy and provisions of the act.

Appellant is not in a business nor related business nor has been in such a business to sell securities. Therefore any alleged violation of the Securities Act would by necessity be technical in nature or an isolated transaction by definition and not subject to the act.

The legislative intent in both the state

and federal statutes was to give the term "isolated transaction" its ordinary meaning of "isolated", which is unique, occurring alone or once, sporadic, not likely to recur. Volumes of case law abide this definition. Such an exemption was to prevent the "overreach" abusive action by a government bureaucracy exactly as has occurred in the instant case. See; Nelson v. State, 355 P.2d 413, State v. Weisser 161 N.W. 2d 360, Kneeland v. Emerton, 183 N.E. 155, Gales v. Weldon, 282 S.W. 2d 522, Arizona v. Allen 107 Ariz. 538, Davies v. Acware Plastics 254 P.2d 663. In order for a transaction to be removed from the scope of an exemption in an "isolated transaction" where sales are not made in the course of repeated or successive transactions, and are not made for the benefit of the issuer or an underwriter of the securities, it must be shown that there were repeated and successive transactions and that the sales were made for the benefit of the issuer or the underwriter Arizona v. Allen

490 P.2d 10.

The legal standard applied and well should be applied in most claims of exempt isolated transactions is whether the party claiming the exemption has been engaged in the business of dealing in securities and is the transaction unconnected from his regular occupation. In this case the party claiming the exemption has not engaged in the business of dealing in securities and the transaction is unconnected from his regular occupation. See Marble v. Clein 347 P.2d 830

CONCLUSION

If the Court of Appeals was correct in it's conclusion that the issue was one of fact for the trier of facts, then the New Mexico Securities erred in the question of law. In that event, the Court of appeals should be instructed to remand the case to the District Court so the issue may be resolved by Jury. If the Court of Appeals was incorrect, and the question was one of law, then the Court of

Appeals refusal to review the issue was erroneous denying petitioner his due process and the Court of Appeals should be instructed to review the NMSD legal determination of the laws and statutes governing "isolated transactions" and "Exemptions under the statutes". In either event Petitioner requests that this Court reverse the decision of the Court of Appeals or the case be remanded to the district Court for a trial by jury.

WHEREFORE, the petitioner, Sam S. Jenkins, Sr., respectfully requests that, a writ of certiorari should issue to review the decision of the Order of the Securities Division of The State Of New Mexico, The Memorandum Opinion Of The Court of Appeals of the State Of New Mexico and the Order denying Writ of Certiorari by the Supreme Court Of The State Of New Mexico and the Original Order issuing from the New Mexico Securities Division be reversed.

Respectfully Submitted,

Sam S. Jenkins, Sr.

By:_____

Pro se for Appellant
POB 21032
Albuquerque, New Mexico 87154
Telephone: 505-821-7522

I HEREBY CERTIFY three copies of the foregoing pleading has been mailed to the parties of record this_____day of September, 1995.

By_____

Sam S. Jenkins, Sr., Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE

STATE OF NEW MEXICO

STATE OF NEW MEXICO SECURITIES DIVISION,

Plaintiff-Appellee

vs.

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COURT OF APPEALS
STATE OF NEW MEXICO
P.R. WALLACE, CLERK

SAM S. JENKINS, SR.,

Respondent-Appellant

No. 15,836

(State of New Mexico Securities Division, order No. 94-93-064-125(FO))

CALENDAR NOTICE

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on **November 10, 1994.** This case has been assigned to the **SUMMARY CALENDAR.**

Summary affirmance is proposed.

We are hereby quash the Order to Show Cause issued by this court on October 21, 1994 in light of the Respondent's response dated November 3, 1994.

Issues on Appeal. Judicial review of decisions by agencies is based on the whole record. Cibola Energy Corp. v. Roselli, 105 N.M. 774, 776, 737, p.2d 555, 557 (Ct. App. 1987) In order to determine whether the Securities Division erred in adopting the recommendations of the hearing officer, this court independently examines the administrative record to determine whether that decision was arbitrary and capricious, was supported by substantial evidence, and was within the scope of the administrative body's authority. Anaya v.New Mexico Personal Board, 107 N.M. 622, 625, 762, p.2d 909, 912, (Ct. App.), cert. denied, 107 N.M. 673, 763, p.2d 689 (1988). This Court must determine whether, on balance, the record as a

whole contains substantial evidence to support the Security Divisions findings. Id,; see also in re Mountain Bell, 109 N.M. 504,505, 787 p. 2d 423, 424 (1990)and It's Burger Time, Inc. v. New Mexico Dept't of Employment Sec. Dep't Bd. of Review, 108 N.M. 175, 177, 769, p.2d 88, 90, (1989). We must also determine that the findings made support the conclusions of law that the conclusions of law are sound.

In adopting the recommendations of the hearing officer, the Securities Division concluded that 1) the shares in All States Publishing, Inc. offered by the respondent (see plaintiff's exhibits 2, 3 and 4) were "securities" within the meaning of NMSA 1978, Section 58-13B-2 (V) (Repl. Pamp, 1991) of the Securities Act of 1986 (the "Act"); 2) Respondent violated NMSA 1978, Section 58-13B-20 (Repl. Pamp. 1991) of the act by offering to sell securities which were neither registered nor exempt under the Act; 3)Respondent violated Section NMSA 1978, Section 58-13B-3

(A)(Repl. Pamp. 1991) of the Act by offering to sell securities as an unlicensed sales representative; 4) the Division did not sustain its burden of proof in showing that Respondent's conduct violated NMSA 1978, Section 58-13B-5 (Repl. Pamp. 1991) of the Act by acting as an unlicensed investment advisor; and (5) given these violations, it was in the public interest and consistent with the purposes of the Act to enter a final order. (RP4) In the Final Order. the Securities Division offered the respondent to 1) cease and desist from soliciting, offering, and selling securities of any kind in New Mexico without first complying with all requirements of the Act; and (2) within thirty days of the receipt of the Order pay a total civil penalty in the amount of $2,000.00 pursuant NMSA 1978, Section 58-13B-37 (Repl. Pamp. 1991) of the Act. (RP 5)

Based on the Docketing Statement, except for the legal issues discussed below, Repondent's "Points" on appeal (DS 3-4) appear to be matters relating to the conduct of witnesses

and attorneys, the bases of facts the creditability and truthfulness of the witnesses involved and documents presented at the Securities Division hearing-- all matters for the factfinder rather than this Court. See Herman v Miners' Hosp., 111 N.M. 550, 552, 807 P. 2d 734, 736, (1991) ("to determine whether a challenged finding is supported by substantial evidence, we have always given deference to the factfinder, even when we apply... whole record review"). Moreover, the existence conflicting or contradictory evidence obligates the factfinder to resolve the conflicts and contradictions. See Mascarenas v. Jaramillo, 111 N.M. 410, 412, 806 P2d 59, 61, (1991) (only the trier of fact may weigh the testimony, determine the creditability of witnesses, reconcile inconsistent or contradictory statements of a witness, and say where the truth lies). This Court would have been able to determine whether greater weight would have been due

Respondent's position if Respondent had provided this court with a clear summary of the facts presented below of which he bases his conclusory allegations on appeal of "unsupported evidence" (Point 1); "fraudulent targeting" and "harassment" in another case resulting in a "conflict of interest" in this case (Point 3); "mis-statements and deception" (Point 4); "erroneous" discussion of facts and "mis-statements" (Point 6); and "political persecution" (point 7). See Thornton v. Gamble, 101 N.M. 764, 769, 688, P. 2d 1268, 1273 (Ct. App. 1984) (counsel must set out relevant facts in the docketing statement). Accordingly, we propose to affirm the Securities Division August 9, 1994 Order as based on substantial evidence on the record as a whole with regard to the Points raised by Respondent relating to the creditability and truthfulness of the witnesses, integrity of the hearing officer, and findings of fact made by the Securities Division.

On the legal issues, based on our review of the record, including the exhibits presented at the hearing and the relevant case law, we propose to hold that the Securities Division applied the law correctly. We propose to affirm the Securities Division's determination that the shares offered by the Respondent in All States Publishing, Inc. are "securities." See NMSA 1978, Section 58-13B-2(v) (Repl. Pamp. 1991); see also State v. Sheets 94 N.M. 356, 360-361, 610 P.2d 760, 764-765 (Ct.App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980).

Moreover, we are not convinced on the record before us after review of the relevant statutes and case law, that Respondent's offering of securities is exempt from the registration requirements set forth in Section 58-13B-20 under NMSA 1978, Section 58-13B-27(A) (Repl. Pamp. 1991) (exemption for an isolated non-issuer transaction). Respondent acted as an unlicensed sales representative of the issuing company,

offering shares of stock as investment opportunities, hence securities, to the public pursuant to a newspaper article, information sheet, and certificate of shares and purchase agreement. (Plaintiff's Exhibits 2, 3 and 4 to the hearing). Whether any sales actually took place (Point 3, DS 3) is irrelevant to that determination under Section 58-13B-20, since the statute forbids unregistered nonexempt offerings or sales of securities. Given the content of the newspaper advertisement and the information sheet, we believe that Respondent's offering is exactly the kind of offering of securities that the securities laws were designed to protect the public against. See White v. Solomon, 105, N.M. 366, 368, 732, P.2d 1389, 1391 (Ct. App.), cert.denied, 731 N.M. 290, 731, P.2d 1334 (1987) (the purpose of the securities laws is generally help to be the protection of the public from various methods of unlawful sales of securities). Moreover, we are not persuaded by White, cited by Respondent in the Docketing Statement , that Respondent's offering was an

isolated non-issuer transaction entitled to an exemption under NMSA 1978, Section 58-13-B27(A), since that exemption is designed to cover commercial transactions such as the one time sale of two businesses.

Finally, in the Docketing Statement Respondent has not given this Court any facts raised below or legal authorites which support his assertion that he was exempt from the sales representative licensing requirements of NMSA 1978, Section 58-13B-3(A) (Repl.Pamp. 1991) or entitled to isolated non-issuer transaction exemption under Section 58-13B-28(A), in a situation where the Act places the burden upon the person claiming an exemption. See NMSA 1978, Section 58-13B-28(B) (Repl. Pamp. 1991); see also Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd., 113 N.M. 9,12,820,P.2d 1323, 1326 (1991) (when a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in the manner most favorable to the prevailing party, indulging all reasonable

inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary).

The hearing officer's findings of fact and conclusions of law appear to be based on substantial evidence on the record as a whole. The findings support the conclusions and the conclusions appear to be sound. Accordingly, we propose to affirm the Securities Division's Findings of Fact, Conclusions of Law, and Final Order entered on August 9, 1994. If Respondent has additional facts or authorities to bring to this Court's attention, he should do so in a memorandum pursuant to SCRA 1986, 12-210(D) (3) (Repl. 1992).

_____

Judge

IN THE COURT OF APPEALS OF THE

STATE OF NEW MEXICO

STATE OF NEW MEXICO SECURITIES DIVISION,

Plaintiff-Appellee

No. 15,836

vs.

COURT OF APPEALS NEW MEXICO
FILED
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SAM S. JENKINS, SR.,

Respondent-Appellant

APPELLANT RESPONSE BRIEF TO CALENDAR NOTICE

AND

SUPPORTING MEMORANDUM

COMES NOW SAM S. JENKINS, SR., pro se and files this Brief and Memorandum in Appeal and for this cause states;

1. INTRODUCTORY FACTS:

A. Appellant is not a Broker, Sales Representative or other entity required to be licensed under the New Mexico Securities Act.

B. Appellant is not in a business nor has been in such business to sell securities. Therefore any alleged violation of the Securities Act would by necessity be technical in nature or an isolated transaction and not subject to the act.

C. Appellant is an author and writer and the instant cause arose out of this author advertising to sell an interest in his current book, now published. In fact the ad was withdrawn and no sale of interest in the book resulted.

D. The advertising in the instant cause was exempt from the Securities act as "Isolated non-issuer transaction" under exempt transactions NM 58-13B-27 and therefore no violation occurred or could have occurred.

E. Since the transaction was an exempt transaction, the Securities attempt to frame the transaction as a violation is moot.

II. EXEMPT TRANSACTION, LAW INCORRECTLY APPLIED TO FACTS:

A. The Securities act does not require licensing and registration of persons offering or selling exempt transactions under the securities act. The law has been incorrectly applied to the facts in this case.

B. The transaction described in this case is exactly the kind of transaction described as an exempt Isolated non-issuer transaction under Securities statute NM 58-13B-27. The legislative intent was to give the term "Isolated transaction" its ordinary meaning of "isolated" which is "unique, occurring alone or once, sporadic, not likely to recur. Such an exemption was to prevent the "overeach" abusive action by a government bureaucracy exactly as has occurred in the instant case.

C. Under the Securities act an "Isolated non-issuer transaction" is exempt from the operation of the statute, See Nelson v. State,

355 P. 2d 413. Isolated transactions are also excempt under other simular statues regulating traffic in securities, See State v. Weisser 161 N.W. 2d 360. An "isolated" sale of security means one standing alone, disconnected from any other, whereas repeated successive sales means transactions undertaken and performed performed one after the other and sales made within a period of such reasonable time as to indicate that one general purpose actuates the vendor and that such sales promote the same general aim and are not so detatched and separated as to form no part of a single plan, See Kneeland v. Emerton, 183 N.E. 155 and See Gales v. Weldon, 282 S.W. 2d 522.

In order for a transaction to be removed from the scope of an exemption in an "isolated transaction" where sales are not made in the course of repeated or successive transactions, and are not made for the benefit of the issuer or an underwriter of the securities, it must be shown that there were repeated and successive

transactions and that the sales were made for the benefit of the issuer or an underwriter, See State v. Allen 490 P.2d 10.

The legal standard applied in most claims of exempt isolated transactions is whether the party claiming the exemption has been engaged or is engaged in the business of dealing in securities and is the transaction unconnected from his regular occupation. See Marble v. Clein 347 P.2d 830;

Appellant in this case contended that he was not regularly engaged in the business of dealing in securities, and that this was a single, isolated act unconnected with his regular occupation. He further claims that the complaint does not allege any facts from which an inference can be drawn that such dealings were a regular practice with him. The Supreme Court of Washington agreed with Appellant. See State Of Arizona v. Allen 107 Aris. 538

Defendant Allen sold his own stocks through an offer in writing to ten different prospects. The Supreme Court of Arizona ruled the sale of stocks, although securities, was an "Isolated transaction" and not subject to the registration requirement of the Securities act.

See Davies v. Acware Plastics 254 P.2d 663

Gummo sold stock and complaint alleged that the stock was sold for the benefit of the corporation and no registration under the securities act was obtained and therefore was a violation of the securities act. The Court of Appeals in this case ruled where president and treasurer of a corporation was not engaged in business of selling stock, and sale of his personal stock to another was a "single, isolated transaction", he was not subject to the securities act.

CONCLUSION

It becomes apparent from the above that the Securities Commission had no standing to pursue

the instant cause once the evidence obtained early on pointed to an exempt "isolated transaction" under the securities act. That the Securities Commission pursuit of the alleged complaint was an act of political persecution under the guise of judicial prosecution violating Appellants constitutional rights under due process.

Appellant further concludes such pursuit occurred only because appellant was an author who had written a book on the American judicial system and the dominant lawyer culture in America, which book is not complimentary of that culture. A constitutional conflict presents itself here. That conflict of interest was pervasive in this case from beginning to end. First, an alleged complaint by a government agency headed by a lawyer who had evidence of an exempt transaction before the complaint was issued. Secondly, a personal investigation by a lawyer. Third, a trier of facts or fact

finder who is a lawyer in a related case with the Appellant. Fourth and finally erroneous conclusions of law applied to the facts by lawyers number one and three.

Appellant requests this Court reverse the order of the Securities Commission based upon applicable law incorrectly applied to the facts in this case. Appellant further requests this Court to order financial sanctions against the Securities Commission Agency for unconsciable and wilful acts of harrassment in pursuing Appellant in an action which they knew by all standards was exempt from the Securities act.

Respectfully Submitted

SAM S. JENKINS, SR., pro se
For Appellant
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I hereby certify that a true copy of the foregoing pleading was mailed this 19 day of December to the Plaintiff in this case.

Sam S. Jenkins, Sr.

IN THE COURT OF APPEALS OF THE

STATE OF NEW MEXICO

STATE OF NEW MEXICO SECURITIES DIVISION,

Plaintiff-Appellee

No. 15,836

FILED
93 MAR 16 AM 8:30
COURT OF APPEALS
STATE OF NEW MEXICO
P.R. WALLACE, CLERK

vs.

SAM S. JENKINS, SR.,

Defendant-Appellant

ADMINISTRATIVE APPEAL FROM THE NEW MEXICO SECURITIES DIVISION
Nancy M. Smith, Director

Michael J. Vargon
Santa Fe, New Mexico — Deputy Director New Mexico Securities Division

Sam S. Jenkins, Sr.
Albuquerque, New Mexico — Pro Se

MEMORANDUM OPINION

ALARID, Judge.

Respondent Sam S. Jenkins, Sr. appeals the

Securities Division order dated August 9, 1994. This Court's calendar notice proposed to affirm the order of the Securities Division. Respondent filed an untimely memorandum in opposition to this Court's proposed disposition, due December 13, 1994, but filed on December 20, 1994. Even if we consider the arguments made by Respondent in the untimely memorandum, however, we are unpersuaded by them for the following reasons.

In the calendar notice, we stated that judicial review of decisions by agencies is based on the whole record. Cibola Energy Corp. v. Roselli, 105 N.M. 774, 776, 737, P.2d 555, 557 (Ct. App. 1987). In order to determine whether the Securities Division erred in adopting the recommendations of the hearing officer, this Court independently examines the administrative record to determine whether that decision was arbitrary and capricious, was supported by substantial evidence, and was

within the scope of the administrative body's authority. Anaya v. New Mexico State Personnel Bd., 107 N.M. 622, 625, 762, P.2d 909, 912 (Ct. App.)cert. denied, 107 N.M. 673, 763, P.2d 689 (1988). This Court must determine whether, on balance, the record as a whole contains substantial evidence to support the Security Division's findings. Id.; see also In re Mountain Bell, 109 N.M. 504, 505, 787, P.2d 423, 424 (1990). and In re Apodaca, 108 N.M. 175, 177, 769, P.2d 88, 90 (1989). We must also determine that the findings made support the conclusions of law and that the conclusions of law are sound.

In Adopting the recommendations of the hearing officer, the Securities Division concluded that: (1) the shares in All States Publishing Inc. offered by Respondent were "securities" within the meaning of NMSA 1978, Section 58-13B-2(V) (Repl. Pamp, 1991) of the Securities Act of 1986 (the "Act"); (2) Respondent violated

NMSA 1978, Section 58-13B-20 (Repl. Pamp. 1991) of the Act by offering to sell securities which were neither registered nor exempt under the Act; (3) Respondent violated Section NMSA 1978, 58-13B-3(A) (Repl. Pamp. 1991) of the Act by offering to sell securities as an unlicensed sales representative; (4) the Division did not sustain its burden of proof in showing that Respondent's conduct violated NMSA 1978, Section 58-13B-5 (Repl. Pamp. 1991) of the Act by acting as an unlicensed investment advisor; and (5) given these violations, it was in the public interest and consistent with the purposes of the Act to enter a final order. In the Final Order, the Securities Division ordered the Respondent to: (1) cease and desist from soliciting, offering, and selling securities of any kind in New Mexico without first complying with all requirements of the Act; and (2) within thirty days of the receipt of the order pay a total civil penalty in the amount of $2,000.00

pursuant to NMSA 1978, Section 58-13B-37 (Repl. Pamp. 1991) of the Act.

After reviewing the memorandum in opposition, we continue to believe that except for the legal issues discussed below, Respondent's "Points" on appeal appear to be matters relating to the conduct of witnesses and attorneys, the bases of facts, the credibility and truthfulness of the witnesses involved, and documents presented at the Securities Division hearing--all matters for the fact finder rather than this Court. See Herman v. Miner's Hosp., 111 N.M.550, 552, 807, P.2d 734, 736, (1991)("to determine whether a challenged finding is supported by substantial evidence, we have always given the deference to the fact finder, even when we apply... the whole record review"). Moreover, as we stated in the calendar notice, the existence of conflicting or contradictory evidence obligates the fact finder to resolve the conflicts and contradictions. See

Mascarenas v. Jaramillo, 111 N.M. 410, 412, 806, P.2d 59, 61, (1991) (only the trier of fact may weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of a witness, and ascertain the truth).

After reviewing the Memorandum, and because the Securities Division began its investigation of Respondent prior to learning about the content of the book Respondent was writing, we continue to believe that Respondent has provided this court with essentially conclusory allegations on appeal of "unsupported evidence"; "fraudulent targeting" and "harassment" in another case resulting in a "conflict of interest" in this case; "mis-statements and deception"; "erroneous" discussion of facts and "mis-statements"; and "political persecution". See Thornton v. Gamble, 101, N.M. 764, 769, 688, P.2d 1268, 1273, (Ct.App. 1984)(counsel must set out all relevant facts in the docketing

statement).

Accordingly, we affirm the Securities Division August 9, 1994 order as based on substantial evidence on the record as a whole with regard to the points raised by Respondent relating to the credibility and truthfulness of the witnesses, integrity of the hearing officer,and findings of fact made by the Securities Division.

On the legal issues, we hold that the Securities Division applied the law correctly. First, we affirm the Securities Division's determination that the shares offered by the Respondent in All States Publishing, Inc. are "securities." See NMSA 1978, Section 58-13B-2(V) 27(A) (Repl.Pamp 1991; see also State v. Sheets, 94 N.M. 356, 360-361, 610 P.2d 760,764-765 (Ct.App.), cert denied, 94 N.M. 675, 615, P.2d 992 (1980).

Second, we are not convinced on the record before us after review of the relevant statues, New Mexico case law and the out-of-state case

law cited by Respondent in the memorandum that Respondent's offering of securites is exempt from the registration requirements set forth in Section 58-13B-20 under NMSA 1978, Section 58-13B-27(A) (Repl. Pamp. 1991)(Exemption for and isolated non-issuer transaction). Respondent acted as and unlicensed sales representative of the issuing company by offering shares of stock as investment opportunities, hence as securities, to the public pursuant to a newspaper advertisement,information, sheet certificate of shares, and purchase agreement, for the benefit of himself/his company, the issue. Whether any sales actually took place is irrelevant to the determination under Section 58-13B-20, since that statute forbids unregistered nonexempt offerings or sales of securities. Moreover, under the current New Mexico law, the isolated non-issuer transaction exemption is designed to cover commercial transactions such as the one time sale of two

businesses. White v. Solomon 105 N.M. 366, 368, 732, P.2d 1389, 1391 (Ct. App. 1986), cert. denied 105 N.M. 290, 731 P.2d 1334 (1987).

Finally, Respondent has not given this Court any facts raised below or legal authorities which support his assertion that he was exempt from the sales representative licensing requirements of Section 58-13B-3(A), in a situation where the Act places the burden upon the person claiming an exemption See NMSA 1978, Section 58-13B 28(B) (Repl.Pamp. 1991);see also Golden Cone Concepts, Inc. v Villa Linda Mall, 113 N.M. 9, 12, 820, P.2d 1323, 1326 (1991) ("when a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in a manner most favorable to the prevailing party, indulging in all reasonable inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary").

The hearing officer's findings of fact and conclusions of law appear to be based on

substantial evidence on the record as a whole. The findings support the conclusions and the conclusions appear to be sound. Accordingly, we affirm the Securities Division's Findings of Fact, Conclusions of Law, and Final Order entered on August 9, 1994.

IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:

RUDY S. APODACA, Chief Judge

HARRIS L HARTZ, Judge